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February 6, 2003

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

Attached for inclusion in the record of this proceeding is a letter to Chairman Powell and the commissioners showing that, if incumbent local exchange carriers did not permit access to the platform of network elements to new entrants serving mass-market customers, they would be in violation of the nondiscrimination requirement of section 251(c)(3).

In accordance with FCC Rule 1.49(f), this *ex parte* letter and attachment are being filed electronically pursuant to FCC Rule 1.1206(b)(1).

Sincerely,

/s/

Christopher J. Wright
Counsel Z-Tel Communications, Inc.

cc:

Chris Libertelli	Rob Tanner
Matt Brill	Jeremy Miller
Jordan Goldstein	John Rogovin
Dan Gonzalez	Linda Kinney
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February 6, 2003

Ex Parte

Honorable Michael K. Powell
Chairman
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Commissioners
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, DC 20554

Re: Manual hot cuts result in discriminatory access to network elements in violation of section 251(c)(3), CC Docket Nos. 01-338, 96-98, and 98-147

Dear Chairman Powell and Commissioners:

As the Triennial Review nears completion, it bears emphasis that the evidence in the record confirms that new entrants seeking to serve residential and small business customers are impaired without access to unbundled switching on account of the problems associated with manual hot cuts. In addition, and separate from the analysis of whether new entrants are impaired within the meaning of section 251(d)(2) without access to unbundled switching, the record shows that the incumbents would violate the nondiscrimination requirement of section 251(c)(3) if new entrants serving mass-market customers did not have access to the platform of network elements. In the absence of electronic provisioning or access to the platform, incumbent local exchange carriers would provide discriminatory access to loops because the incumbent would have quicker, more reliable, and less expensive access to loops.

In our opening comments, we showed that Z-Tel had considered deploying a switch in New York City, but concluded that, even if switches were free, it would not be profitable to deploy a switch on account of the problems associated with manual hot cuts.[1] That conclusion resulted both from the high cost of hot cuts and the incumbent's inability to deliver a large

[1] Comments of Z-Tel Communications, Inc., April 5, 2002, at 36.

volume of hot cuts in a timely fashion and without error, even in New York. We concluded that, if self-provisioned switching could not be used there, it could not be used anywhere to serve mass-market customers.[2] That showing stands unrebutted.

In our reply comments, we responded to the "switch count" arguments the incumbents made and continue to make. We explained that the mass market is different in many critical respects from the market for large businesses and data-intensive users, so that the deployment of a switch to serve the latter market does not show that it is feasible to use the switch to serve residential and small business customers. Indeed, the evidence jointly submitted by the Bell Operating Companies, rather than rebutting our submission, confirmed it: their best evidence showed that, six years after enactment of the 1996 Act, about one-tenth of one percent of mass-market lines in this country are served by new entrants that use the "UNE-L" approach.[3] That confirms that the UNE-L entry strategy favored by the incumbents will not lead to vigorous competition for mass-market customers.

More recently, SBC submitted evidence showing that even a hypothetical, switch-based entrant would incur increased switching costs of more than 400% and increased total network costs of more than 140% if it were required to use the UNE-L approach.[4] As Z-Tel demonstrated in response, that significant cost differential would impair new entrants seeking to serve residential and small business customers.[5] SBC yesterday attempted to resuscitate any value to it from its UNE-L cost model, but failed to address the core point of Z-Tel's rebuttal: that in competitive markets, firms hampered by higher costs will have a harder time competing.[6] Under Z-Tel's unrebutted econometric analysis, SBC's hypothetical, fully-loaded and efficient UNE-L CLEC would have substantially higher costs than SBC. SBC also failed to address Z-Tel's argument that SBC's model shows natural monopoly characteristics, and therefore the resulting cost disparities constitute impairment under any plausible reading of that term. Once again, therefore, even the incumbent's best evidence shows that new entrants seeking to serve the mass market are impaired without access to unbundled local switching.

In its recent submission, SBC also mischaracterized a submission by WorldCom, which concluded that UNE-L is not a viable entry strategy in central offices with fewer than 25,000 lines. In larger central offices, WorldCom stated, UNE-L entry might be possible *once the problems with manual provisioning are fixed and other steps are taken to ameliorate the cost disadvantages new entrants face.*[7] SBC reads this as a concession that UNE-loop entry is

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[2] *Id.* at 37.

[3] Reply Comments of Z-Tel Communications, Inc., July 17, 2002, at 49.

[4] Letter from T. Koutsky, G. Ford, and J. Lanning, Z-Tel, to Chairman Powell and Commissioners, January 29, 2003, at 2.

[5] *Id.*

[6] Letter from James C. Smith, SBC, to Chairman Powell,Feb. 4, 2003.

[7] Letter from Donna Sorgi, WorldCom, to William F. Maher, January 8, 2003.

feasible in those offices without improvement in the provisioning process or amelioration of cost disparities.[8] But it plainly was not.

Analytically separate from impairment is the issue of discrimination. One of the most basic requirements of the 1996 Act is that incumbents must provide access to network elements on a nondiscriminatory basis. That requirement of section 251(c)(3) was interpreted by the Commission to mean that "the access ... provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides itself."[9] That requirement was codified in the Commission's regulations.[10] The access provided to loops is *not* equal-in-quality when the time to provision a loop is greater for a new entrant than for the incumbent, the likelihood of service disruption is greater, and the cost is greater as well. With loops hard-wired into incumbent switches, incumbents may turn on service almost immediately, with almost no chance of error and virtually no cost. Even in their promises of improved hot-cut performance, the incumbents do not claim that they can provide hot cuts in large numbers immediately, with almost no chance of error, and at virtually no cost.

Thus, at present, without electronic provisioning or its equivalent, the incumbent provides superior service to itself than to a competitor using unbundled loops, in violation of section 251(c)(3) and the implementing regulation. The availability of the platform of network elements mitigates that problem, since it permits new entrants to access the incumbents' loops in timely fashion, with little chance of error, and at very little cost. If, however, the platform were no longer available to new entrants seeking to serve mass-market customers, incumbents would be in violation of section 251(c)(3)'s nondiscrimination requirement. The Commission recognized this problem in the Notice of Proposed Rulemaking by noting that "requesting carriers may view the incumbent's switch less as an independent network element than as a dependable method of obtaining access to the incumbents' loops."[11] That is so: the main reason new entrants need access to unbundled switching is to obtain access to loops on terms equal to those of the incumbents. In this respect, unbundled switching has value because it is a mechanized and efficient method of obtaining access to a loop to provide mass-market services.

The incumbents' responses to these points have been woefully inadequate. With respect to the issues of timeliness and errors, they state that approval of their section 271 applications shows that their performance is adequate. That argument is frivolous. The fact that loop provisioning is adequate when new entrants may choose to enter using UNE-P rather than UNE-L says almost nothing about whether loop provisioning will be adequate if UNE-P entry is not permitted. The New York Public Service Commission dryly noted that Verizon's hot cut capabilities would have to increase by 4400% if the platform were not available.[12] If the

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[8] Letter from James C. Smith, SBC, to Chairman Powell, January 14, 2003 ("*SBC Letter*").

[9] *Local Competition Order*, 11 FCC Rcd 15499 ¶312 (1996).

[10] 47 C.F.R. § 51.311(a).

[11] *In re Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, Notice of Proposed Rulemaking, FCC 01-361 ¶ 59.

[12] New York Comments, date, at 3.

Commission even entertains the possibility that an increase of that magnitude will occur without significant problems, that demonstrates that the state commissions must take charge of implementation matters.

With respect to cost, the incumbents argue that significant cost differentials do not count as impairment under section 251(d)(2). [13] There is no merit to that argument either. It is based on a misreading of the Supreme Court's decision in *AT&T v. Iowa Utilities Board*[14] and the D.C. Circuit's decision in *USTA v. FCC*,[15] along with silence concerning the Supreme Court's decision in *Verizon v. FCC*.[16] Judge Bork responded crisply to those arguments. As he stated, under any reasonable reading of those cases new entrants are impaired when they "must incur substantial costs that incumbents do not have to bear."[17] That is particularly so where new entrants must pay the incumbent a substantial amount every time they persuade a customer to switch carriers, which is not the sort of cost that new entrants in virtually any other business face. But even if impairment were given an unwarranted reading under which significant cost disparities did not "count," it could not reasonably be argued that incumbents were providing nondiscriminatory access to network elements when their cost to access loops is substantially lower than the cost to a new entrant.

In these circumstances, independent of the impairment analysis, new entrants are treated in a discriminatory fashion without access to unbundled switching. Their costs, error rates, and the amount of delay before they can provide service are all greater than those of the incumbent. Congress provided in section 251(c)(3) that incumbents must provide "nondiscriminatory access to network elements on an unbundled basis" precisely to prevent that sort of discriminatory treatment.

Sincerely,

/s/

Robert A. Curtis
President, Z-Tel Network Services

Thomas M. Koutsky
Vice President, Law and Public Policy

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[13] *See, e.g.*, *SBC Letter*, Attachment 1, at 1.

[14] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

[15] *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

[16] *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002).

[17] Letter from Robert H. Bork to Chairman Powell, January 10, 2003, at 6.